

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR -3 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JUSTIN W.,)	2 CA-JV 2010-0117
)	DEPARTMENT B
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
STEVEN W., ALLISON W., and)	Appellate Procedure
JUSTIN W., JR.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. S191358

Honorable Hector E. Campoy, Judge

AFFIRMED

Bernice Little

Tucson
Attorney for Appellant

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins

Tucson
Attorney for Appellees
Steven and Allison W.

V Á S Q U E Z, Presiding Judge.

¶1 Appellant Justin W. challenges the juvenile court's order terminating his parental rights to his son Justin Jr., born in October 2006. Justin contends there was insufficient evidence to support the severance of his rights on the ground he is incarcerated for a period "of such length that the child will be deprived of a normal home for a period of years," A.R.S. § 8-533(B)(4), which the court found the petitioners had established by clear and convincing evidence. Justin also maintains there was insufficient evidence that terminating his parental rights was in Justin Jr.'s best interests.

¶2 When Justin Jr. was born, a blood test revealed the presence of methamphetamine. Upon his release from the hospital, he and Justin moved into the home of Justin's parents, the petitioners here. After a dependency action initiated by the Arizona Department of Economic Security was dismissed, Justin was awarded custody of Justin Jr., and the two stayed with the petitioners for approximately eighteen months. Although Justin initially made efforts to learn to care for Justin Jr., the petitioners took primary responsibility for Justin Jr.'s care. After Justin threatened to kill his father during a fight with the petitioners, they asked him to leave the home.

¶3 Justin moved out of the petitioners' home without Justin Jr. in April 2008 and visited with him periodically. And although he had provided some financial support for Justin Jr. while living with the petitioners, he did not provide any financial support after he left. Justin was arrested in November 2008 and was convicted of forgery and attempted fraudulent scheme and artifice. He received concurrent sentences totaling 3.5 years' imprisonment.

¶4 After Justin's arrest, he was never out of custody and has not seen or spoken to Justin Jr. Initially, he asked the petitioners to bring Justin Jr. for a visit and

wrote “a few” letters to petitioners, in which he inquired about Justin Jr. Justin then stopped writing until the instant proceedings began in July 2009, when the petitioners filed a petition to terminate both Justin and the mother’s parental rights.¹ Justin Jr. has remained in the petitioners’ home and according to Justin’s mother, is “attached” to them and “has no relationship” with his father.

¶5 After a hearing on the petition to terminate parental rights, the juvenile court determined the petitioners had not proven abandonment as a ground for termination as to Justin, but ruled that they had proven by clear and convincing evidence the ground of incarceration under A.R.S. § 8-533(B)(4). In support of that ruling, the court noted the following: (1) Justin had a less than “secure” relationship with Justin Jr. before his incarceration, (2) Justin had “made little or no effort to compel . . . contact” with Justin Jr. since being incarcerated, (3) the possibility that Justin could remain in custody beyond his earliest release date or could face other conditions of release that would impede his taking custody of Justin Jr. even if he were released, (4) its doubts that Justin would “be immediately able to take a five year old into his custody and support him upon his discharge from prison,” and (5) the mother had abandoned the child. It also concluded that termination of Justin’s parental rights was in Justin Jr.’s best interests. This appeal followed.

¶6 We will not disturb an order terminating parental rights so long as there is reasonable evidence to support the factual findings upon which the order is based. *Audra T. v. Ariz. Dep’t of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). Stated differently, we will reverse an order terminating a parent’s rights only if the order

¹Justin Jr.’s mother’s parental rights were also severed as a result of these proceedings. She is not a party to this appeal.

is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶7 Section 8-533(B)(4) provides, in relevant part, that termination of the parent-child relationship is justified if “the parent is deprived of civil liberties due to the conviction of a felony . . . [or] the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years.” There is no bright-line rule for determining when a prison sentence will deprive a child of a normal home for a period of years. *Michael J. v. Ariz. Dep't. of Econ. Sec.*, 196 Ariz. 246, ¶ 29, 995 P.2d 682, 687 (2000). Instead, the juvenile court must review each case on its own facts. *Id.* In *Michael J.*, our supreme court stated,

The trial court, in making its decision, should consider all relevant factors, including, but not limited to: (1) the length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue.

Id.

¶8 Justin does not argue the juvenile court failed to properly consider these factors, but instead maintains that because he could be released from prison as early as May of 2011, “[i]t would be error to uphold the termination.” As we stated in *Jesus M.*, however, the focus is not solely on the amount of time a parent has yet to serve as of the date of the severance hearing or termination order, but on “the total length of time the

parent is absent from the family.” 203 Ariz. 278, ¶ 8, 53 P.3d 203, 206 (App. 2002). And, although the court may consider “the period of time from imprisonment until release” as part of its inquiry, *Ariz. Dep’t of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, ¶ 15, 225 P.3d 604, 607 (App. 2010), when the parent’s release date is uncertain, the court should “consider the entire length of the sentence and not whether the parent may be parole eligible within that time,” *James S. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 351, n.3, 972 P.2d 684, 687 n.3 (App. 1998).

¶9 As noted above, Justin has been in custody since November 2008 and is serving a 3.5-year prison term that could extend until May 2012. Even if he is released at the earliest possible date, Justin will have been incarcerated for over two and a half years, more than half of Justin Jr.’s life to that point. In view of that fact, and the juvenile court’s findings on the other *Michael J.* factors, we cannot say the court clearly erred in finding “the father’s length of prison sentence is of such length that Justin[, Jr.] will be deprived of a normal home for a period of years.”

¶10 Next, Justin contends the juvenile court improperly considered what would happen after his release from prison. He argues that “[n]o evidence was ever presented at trial regarding what may or may not be required of [him] once he is released from prison” and that “what will happen after [he] has been released” is not included in the list of factors set forth in *Michael J.* But that list is not exhaustive. See *Matthew L.*, 223 Ariz. 547, ¶ 8, 225 P.3d at 606. Rather, our supreme court instructed trial courts to “consider all relevant factors.” *Michael J.*, 196 Ariz. 246, ¶ 29, 995 P.2d at 687. And, pursuant to A.R.S. § 41-1604.07(F), if granted early release, Justin could be required as a condition of community supervision to participate in a drug treatment or education program. Justin

has not explained why the petitioners were required to present evidence of statutory provisions relating to release conditions. *See Mercer v. Vinson*, 85 Ariz. 280, 288, 336 P.2d 854, 860 (1959) (“[P]ublic statutes need not be pleaded or offered in evidence since courts will take judicial notice thereof.”); *see also* Ariz. R. Evid. 201(b).

¶11 We also reject Justin’s contention there was insufficient evidence to support the juvenile court’s finding that termination of his parental rights to Justin Jr. was in the child’s best interests. Although a statutory ground for terminating a parent’s rights must be proved by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance is in a child’s best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005). That it is in a child’s best interests for a parent’s rights to be terminated “may be established by either showing an affirmative benefit to the child by removal or a detriment to the child by continuing in the relationship.” *Jennifer B. v. Ariz. Dep’t of Econ. Sec.*, 189 Ariz. 553, 557, 944 P.2d 68, 72 (App. 1997).

¶12 Here the juvenile court found that the petitioners, with whom Justin Jr. had lived his whole life, were “providing a positive and appropriate environment” for him. It also found Justin Jr. had a “weak, tenuous and diminishing relationship with his father.” It therefore concluded Justin Jr. would benefit from “obtain[ing] permanency and stability” if Justin’s parental rights were terminated and the petitioners adopted him, as they expressed a desire to do. An adoptive home for a child supports a best-interests finding, especially if that home is one the child already knows and is one in which the child has done well. *See Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004).

Disposition

¶13 The juvenile court's order terminating Justin's parental rights is affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge